TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 78

DAVID G. DIMICK, PETITIONER,

vs.

PETER SCHIEDT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 21, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 5144, Law Docket

PETER SCHIEDT, Plaintiff,

v.

DAVID G. DIMICK, Defendant

WRIT OF ATTACHMENT—Filed April 7, 1932

[L.S.] MASSACHUSETTS DISTRICT, ss:

The President of the United States of America, to the Marshal of our District of Massachusetts, or his Deputy, Greeting:

We command you to attach the goods or estate of David G. Dimick of the City of Portland, in the District of Maine, and a resident and citizen of said District, defendant, to the value of five thousand and no/100 dollars, and summon said defendant (if he may be found in your district), to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Mas-
[fol. 2] sachusetts, on the fourth Tuesday of June. Then and there, in our said Court, to answer unto Peter Schiedt of the City of Boston, in the District of Massachusetts, and a resident and citizen of said District, plaintiff, in an action of tort. To the damage of the said plaintiff (as he says) the sum of five thousand and no/100 dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable JAMES A. LOWELL, JR., at Boston, the twenty-eighth day of March in the year of our Lord one thousand nine hundred and thirty-two.

Helen I. Tweedy, Deputy Clerk.

Officer's Return on Writ

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, March 30, 1932.

Pursuant hereunto I have this day attached a chip as the property of the within named David G. Dimick of the City

of Portland, in the District of Maine, and thereafter on the same day I summoned the within defendant to appear at court and answer as within directed by giving in hand to Morgan T. Ryan, registrar of motor vehicles for the Commonwealth of Massachusetts, at Boston, in said District, a true and attested copy of and an original summons to this writ, together with $2, his statutory fee for acceptance of service thereof.

W. J. Keville, United States Marshal, by John J. Carens, Deputy United States Marshal.

In United States District Court

Plaintiff's Declaration—Filed April 7, 1932

The plaintiff says that he is a resident and citizen of the Commonwealth of Massachusetts; that the defendant is a resident and citizen of the State of Maine, and that the matter in controversy exclusive of interest and costs exceeds three thousand (3,000) dollars.

Count 1. And the plaintiff says that on or about October [fol. 3] 31, 1931, while he was walking on Winthrop Street at or near Greenleaf Avenue, public highways in the City of Medford, in said Commonwealth, he was struck and knocked down by an automobile owned by the defendant and operated by and under the control of the defendant, his servants or agents. And the plaintiff further says that the defendant's automobile was operated in a careless and negligent manner, as a result of which he received severe injuries, suffered great pain of body and anguish of mind and was put to much expense for medicine, medical and hospital treatment, care and nursing, and was otherwise injured, all to his great damage, for the recovery of which he brings this action.

By his Attorneys.

Warner, Stackpole, Bradlee & Cabot.

In United States District Court

Affidavit of Service—Filed April 7, 1932

I, Charles G. Lewis, of counsel for the plaintiff in the above-entitled case, on oath depose and say that I have

complied with the law in obtaining service upon David G. Dimick, the non-resident defendant in this action, by leaving a copy of the process with a fee of two dollars ($2) in the hands of the registrar of motor vehicles for the Commonwealth of Massachusetts, the legally constituted attorney for the defendant; that I did then forthwith send by registered mail notice of such service upon said registrar and a copy of the process to the defendant at 439 Congress Street, Portland, Maine. The return receipt for said registered letter is hereto attached.

Charles G. Lewis.

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss.

BOSTON, April 5, 1932.

Then personally appeared the above-named Charles G. Lewis and made oath that the foregoing statement signed by him is true. Before me,

CHARLES C. CABOT, *Notary Public.* [Seal.]

[fol. 4] Upon the filing of the writ and declaration herein, an order to plead was entered.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 3, 1932

And now comes the defendant in the above-entitled action and for answer to the plaintiff's writ and declaration denies each and every allegation contained therein.

And, further answering, the defendant says that the injuries or damage alleged were caused, in whole or in part, by the plaintiff's own negligence.

By his Attorney.

David H. Fulton.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE TO ADMIT FACTS—Filed July 25, 1932

Take notice that the plaintiff in this case calls upon the defendant to admit for the purpose of this trial only the several facts respectively hereunder specified.

Warner, Stackpole, Bradlee & Cabot, Attorneys for the Plaintiff.

Boston, Massachusetts, July 21, 1932.

David H. Fulton, Esquire, 10 Tremont Street, Boston:

The facts, the admission of which is required, are:

1. On or about October 31, 1931 David G. Dimick was the owner of an automobile which was in collision with Peter Schiedt at or near the intersection of Winthrop Street and Greenleaf Avenue, public highways in the City of Medford and Commonwealth of Massachusetts.

2. On or about October 31, 1931 David G. Dimick was the operator of an automobile which was in collision with Peter [fol. 5] Schiedt at or near the intersection of Winthrop Street and Greenleaf Avenue, public highways in the City of Medford and Commonwealth of Massachusetts.

3. On or about October 31, 1931 David G. Dimick was the owner of an automobile bearing Maine registration number 112,333.

In United States District Court

Plaintiff's Motion that the Defendant Be Required to File a Bill of Particulars—Filed October 27, 1932

And now comes the plaintiff in the above-entitled case and moves that the defendant be required to specify:

1. The name and address of the owner of the automobile in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

2. The name and address of the operator of the automobile in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

3. The registration number, the date of registration and the state in which said automobile was registered in which the defendant was riding at the time of the accident as set forth in the plaintiff's declaration.

4. The operator's license number of David G. Dimick on October 31, 1931, the date it was issued and the state from which it was issued.

5. On whose business or for whose benefit was the said automobile being used in which the defendant was riding

at the time of the accident as set forth in the plaintiff's declaration.

6. Whether the defendant had the permission of the owner or person in control to use the automobile in which he was riding at the time of the accident as set forth in the plaintiff's declaration.

7. In what way the plaintiff was not in the exercise of due care at the time of the alleged accident.

[fol. 6] 8. What negligence of the plaintiff contributed to or was the cause of the injuries which he sustained as alleged in the defendant's answer.

By his Attorneys.

Warner, Stackpole, Bradlee & Cabot.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING MOTION FOR BILL OF PARTICULARS

At the same term, to wit, October 31, 1932, it was ordered by the court, the Honorable James A. Lowell, District Judge, sitting, no one appearing in opposition, that said motion for bill of particulars be allowed.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S BILL OF PARTICULARS—Filed November 22, 1932

1. The name and address of the owner of the automobile in which the defendant was riding is David G. Dimick, 439 Congress Street, Portland, Maine.

2. The name and address of the operator of the automobile in which the defendant was riding is as given in No. 1.

3. The registration number of the automobile referred to in Nos. 1 and 2 was Maine 112,333.

4. The operator's license was 33,672.

5. The automobile was being used on the business of the defendant.

6. The defendant was using his own automobile.

7. The plaintiff travelled from a place of safety into a place of danger in the path of the defendant's automobile, or so close to it that he was incurring undue risk, without using the care which a person of ordinary care would use to avoid risk and danger. This plaintiff stepped out with the defendant's automobile so close to him that he should have known that damage was likely to result to him from his conduct.

8. The negligence of the plaintiff is as set out in No. 7.
By his Attorney.

David H. Fulton.

[fol. 7] This cause was thence continued from term to term to the March Term, A. D. 1933, when, to wit, March 23, 1933, issue having been joined, a jury was duly empanelled to try the issue, the Honorable Hugh D. McLellan, District Judge, sitting.

On the twenty-eighth day of March, A. D. 1933, the following Defendant's Motion for Directed Verdict was filed and denied by the court, exception being saved:

In United States District Court

Defendant's Motion for Directed Verdict—Filed March 28, 1933

Now comes the defendant in the above-entitled cause and moves that the court instruct the jury that upon all the evidence the plaintiff is not entitled to recover and that the jury bring back a verdict for the defendant for the following reasons:

1. That there is no sufficient evidence that the defendant was negligent.

2. That there is no sufficient evidence that the plaintiff was in the exercise of due care.
By his Attorney.

Leo P. Doherty.

On the twenty-eighth day of said March, A. D. 1933, said case was committed to the jury, who, after hearing all mat-

ters and things concerning the same, returned the following Verdict:

IN UNITED STATES DISTRICT COURT

VERDICT—Filed March 28, 1933

The jury find for the plaintiff, and assess damages in the sum of $500 (five hundred dollars) no cents.

John A. Manning, Foreman.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR A NEW TRIAL—Filed March 29, 1933

And the plaintiff moves that the verdict returned by the jury be set aside and a new trial granted for the following reasons:

1. Because the verdict is against the evidence and the weight of the evidence.

[fol. 8] 2. Because the verdict is a compromise verdict and illegal.

3. Because the damages are inadequate.

By his Attorney.

Richard J. Cotter.

Also at the same term, to wit, April 5, 1933, said cause was set down for hearing on the foregoing plaintiff's motion for new trial, the Honorable Hugh D. McLellan, District Judge, sitting, and on the fourteenth day of April, 1933, the following Order on Motion for New Trial was entered:

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR NEW TRIAL—April 14, 1933

McLELLAN, J.

On the authority of Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000

in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages.

Hugh D. McLellan, District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION TO INCREASE AMOUNT OF DAMAGES—Filed April 17, 1933

In accordance with the order of court herein made, with regard to new trial, the defendant files this stipulation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500).

David G. Dimick, by His Attorney: David H. Fulton.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S CLAIM OF EXCEPTION—Filed April 17, 1933

Now, comes the plaintiff and claims an exception to the order of the court handed down on April 14, 1933 in the above case, to wit:

"On the authority of Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages.

Hugh D. McLellan, District Judge."

By His Attorneys.

Warner, Stackpole & Bradlee, R. J. Cotter.

At the same term, to wit, June 5, 1933, a draft bill of exceptions was filed within extended time by the plaintiff. Said cause was thence continued to the present June

Term, A. D. 1933, when, to wit, August 22, 1933, a substituted bill of exceptions is filed by the plaintiff and allowed by the court.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, September 11, 1933, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that Peter Schiedt, plaintiff, recovered of the said David G. Dimick, defendant, the sum of one thousand five hundred forty dollars and seventy-five cents ($1,540.75) damages and interest, together with his costs of suit taxed at forty dollars and seventy-five cents ($40.75).

[fol. 10] IN UNITED STATES DISTRICT COURT

Plaintiff's Substituted Bill of Exceptions

Draft Bill Filed Within Extended Time June 5, 1933;
Substituted Bill Filed and Allowed August 22, 1933

This is an action of tort brought by Peter Schiedt to recover from David G. Dimick for personal injuries alleged to have been caused by the defendant's negligent operation of an automobile on a public way in the City of Medford in the District of Massachusetts. The plaintiff is a citizen and resident of the Commonwealth of Massachusetts and the defendant is a citizen and resident of the State of Maine. The matter in controversy, exclusive of interest and costs, is alleged to exceed three thousand dollars; the *ad damnum* of the writ is five thousand dollars. The writ, pleadings and photographs of the scene of the accident, which were admitted in evidence as "Exhibits 1", "6" and "7", are made part of this bill of exceptions and may be referred to as though specifically incorporated herein. The case was tried before a jury.

The following are all the facts material to this bill of exceptions:

The plaintiff, Peter Scheidt, testified that at the date of the trial he resided with his niece and her husband at 21

Orchard Street, Medford; and that on October 31, 1931, the day of the accident, he resided at 2 South Cedar Place, Boston. He had not worked since the end of June, 1931. He had worked as a cook at the Eastern Yacht Club for six seasons, at Housman's on Avery Street, Boston, for 10 years, and at the Locke Ober restaurant, Winter Place, Boston, for seven years, always as a cook. At the time of trial, he was 56 years of age and unmarried.

On Saturday, October 31, 1931, he went to 21 Orchard Street, Medford, to visit his niece, arriving before seven o'clock in the evening. The evening was dry, pleasant and dark. About 7.30 P. M. the plaintiff left his niece's house, walked along Orchard Street to Winthrop Street, which Orchard Street intersects at right angles. He crossed to the farther side of Winthrop Street, then walked along that side as far as the corner of Greenleaf Street. At that point he looked toward Winthrop Street, which was at his right, to see if there were any cars coming up; then he looked [fol. 11] ahead on Winthrop Street, toward the point where it intersected Boston Avenue; he looked down Greenleaf Street. There were no cars coming on any of these streets. He then took two steps and knew nothing more until he recovered consciousness in the hospital some time later that night. He never saw the car that struck him. He saw no cars coming in any direction on Winthrop Street or on Greenleaf Avenue. There was no horn—nothing to attract his attention as he stepped off the curbing of Greenleaf Avenue.

He remained at the hospital ten days, and could hardly sleep during that time because of pain in his right leg. This leg was broken and the pain ran from a place above the knee down the inside and outside of the back of the leg. He couldn't move the knee because of constant pain. He couldn't straighten out the leg. There were marks on the right side and top of his head, and a spot on his left knee. The pain continued when he was in bed at night and throughout the ten days while he was in the hospital.

From the hospital he returned to his niece's home at 21 Orchard Street. Nurses helped get him on to the elevator and then with Mr. Jones, his niece's husband, helped get him into Mr. Jones' car in which he was taken to Orchard Street. After leaving the hospital he was in bed for three weeks. The pain of the leg was so severe during all of that time that he was unable to sleep at all. At the hospital

the plaintiff was attended by Dr. Campbell who was attached to the hospital, and by Dr. MacDonald, his niece's doctor, who saw him three times there. Dr. MacDonald came to see him four or five times during the three weeks the plaintiff was in bed at his niece's home after he left the hospital.

Once during the three weeks he had a fainting spell while he was sitting up in the kitchen. In addition to that fainting spell, his head constantly felt dizzy. That continued to the time of trial, when he never had the feeling so bad, but if he moved his head a little bit it sometimes made him all dizzy for a second. This happened nearly every day, but not so that he would fall down. He could not remember things as fast as formerly; his weight was [fol. 12] at least fifteen pounds less than before. Outside of not being able to bend his right knee, he could not, up to the time of the trial, move four toes in his right foot. This affected his walking. The right foot was too weak to take a step like the left foot. He moved his right foot by pulling it along. He continued to see Dr. MacDonald often in the spring in April, going to his office at Boston Avenue, Medford. Dr. MacDonald used to bake the knee. The plaintiff last saw Dr. MacDonald in August, 1932. Dr. MacDonald then sent him to a Swedish masseuse, who had treated him twenty times.

By the time of the trial he could stand on his right leg for a short time—about half an hour—then it would begin to pain so that he would have to sit down. He had not gone back to work at the Locke Ober restaurant because he could not walk. There was no other work which he could do in the kitchen; you have to use your feet too much there. The plaintiff said that he had an opportunity to return to work right after he came back from the hospital. He has done nothing since and has made no money. When the plaintiff last worked as a cook, he earned $24 a week with three meals a day for six days a week.

The plaintiff pointed out on the photograph, which was admitted in evidence as "Plaintiff's Exhibit 1", Greenleaf Avenue and Winthrop Street, the side of Winthrop Street where he was walking just before the accident, the point where he was stepping off when struck.

A bill dated November 9, 1931 in the amount of $50 from the Lawrence Memorial Hospital (which was paid by the plaintiff) and bill dated January 16, 1932 in the amount of

$10 from the Lawrence Memorial Hospital, both of which had been paid by the plaintiff, were admitted in evidence as "Plaintiff's Exhibits 2 and 3". A bill dated December, 1931, Dr. Ray T. MacDonald, in the amount of $12 was marked as "Plaintiff's Exhibit 4". There was another bill from Dr. MacDonald for $60 which had not been paid. A receipted bill of Mrs. Gerda Harold, masseuse, in the amount of $40 was in evidence marked "Plaintiff's Exhibit [fol. 13] 5". By the doctor's orders, the plaintiff bought an elastic band for his knee which cost $4.50 and prescriptions costing $1.40.

On cross-examination, the plaintiff explained that Winthrop Street intersects Boston Avenue; that as one leaves Boston walking down Winthrop Street, Chester Road is the first street on the right, then Greenleaf Avenue on the right and then, a little further, Orchard Street on the left. At the time of the accident, the plaintiff was walking in the opposite direction on Winthrop Street from Orchard Street up toward Boston Avenue. The plaintiff testified that after leaving the curb at the corner of Winthrop Street and Greenleaf Avenue, he took one step and had not completed the second when he was struck. Just before crossing he was looking out for automobiles. He did not hear any horn. He said he did not take any notice of other persons at the corner of Greenleaf Avenue and Winthrop Street because he had his mind on cars and never notices anyone when he is out walking.

After the accident he came to in the hospital, the Lawrence Memorial Hospital. He was not operated upon there. He slept some in the hospital, not naturally. Whatever they gave him he did not know.

"X Q. 1. But you slept as a result of whatever they gave you?

A. I slept just short times; that was all.

X Q. 2. And you were in pain, I suppose, and you complained?

A. Well, I did not complain. I took it as it came.

X Q. 3. You did not complain of pain. Is that right?

A. Yes, sir.

X Q. 4. And did you ever complain of pain any time that you were in the hospital?

A. No; it is no use to complain. I thought the best way to get along was to keep quiet."

Before the accident he never had headaches except when he had a cold. Before the accident he wore glasses to read and for outside. He could see as well before the accident as now. If he wanted to see anything in a distance or see any kind of print, he wore glasses. He had not worn them for outside since the accident because he didn't have any [fol. 14] and didn't want to buy any since then. He had his glasses on the night of the accident. He had never fainted before the accident.

He told Dr. MacDonald there was something wrong with his toes, but not at the hospital. His leg was so stiff he could not tell just where it was. When Dr. Campbell was looking at his leg, he did not think it was necessary to tell him anything about it. That was why he was a doctor.

"X Q. 5. Well, you were getting pain, even though you did not complain of it, you say, in your toes at the time?

A. My whole legs pained. I did not know which one.

X Q. 6. But you did not complain about that to the doctor?

A. No, because the doctor is supposed to see what is the trouble with you."

The first time he told anybody about the toes was in the summer of 1932. When he saw that they were not coming around all right he told Dr. MacDonald.

When Dr. MacDonald had an office on Boston Avenue, plaintiff used to walk up to see him. He used to walk up the hill to see the doctor twice a week. It is not a steep grade. The doctor afterwards sent him over to Sterling Street, Somerville. This was half a mile from Orchard Street, Medford. He would take this walk of half a mile each way twice a week.

Business was slack at the Locke Ober restaurant during the summer. The plaintiff was an all around-cook, sometimes working at the range and sometimes at the broiler. He did not sit down doing his work. Everybody who worked in the kitchen had to be on his feet.

On redirect examination, the plaintiff testified that he had no trouble with his knee, no dizzy spells or no fainting spells before the accident.

Frank Stuart testified that about 7:30 P. M. on October 31, 1931, he was visiting Mr. and Mrs. Gale downstairs at

their house on the corner of Greenleaf Avenue and Winthrop Street. Exhibit 1 shows the house. There was to be a bridge game there that night, and other guests were expected. He was looking out of a side window at the corner [fol. 15] of the house and from that window he could see the corner of Winthrop Street and Greenleaf Avenue. He saw the plaintiff come walking up Winthrop Street to the corner of Winthrop Street and Greenleaf Avenue. The plaintiff took a step and was about to take a second when the defendant's car came around the corner, cut the corner sharply on the left and struck the plaintiff. Witness then jumped off the couch where he was sitting, told the others that there had been an accident, and went out half a minute or so after the accident. He did not see the defendant's car come to a stop before he left the window. He was unable to estimate the speed of the car. When he came out of the house he saw the car stopped on Greenleaf Avenue about fifty feet from the corner of Winthrop Street. He then saw the plaintiff, whom he had never seen before the time of the accident, propped up against the curbstone behind it. The plaintiff was in a dazed condition; he didn't know his name or where he was or anything like that. Two fellows came from the defendant's Ford car. Witness remained until the ambulance took the plaintiff away, then he went to the police station with Mr. Chase, and Mr. Olsen, two other men who were there. He couldn't say one way or the other what he observed about Mr. Dimick's condition. He did not talk with him. The witness rode to the police station in Mr. Dimick's car. He did not know who drove Dimick's car; he thought the fellow himself drove the car.

In cross-examination the witness testified that he did not tell the man at the desk at the station that he saw the accident. He didn't tell him that because he didn't want to get mixed up in it, that was all. The first one to whom he gave his name as having seen the accident was one of the lawyers that came down. He did not recall anyone saying to the police officer, "I saw the accident." He would not say that no one did say that. He testified further that he arrived at Mr. Gale's house about 5.30 or 6 P. M. The bridge party was to be about 8 or 8.30. He had his supper there. The accident occurred between 7 and 7.30. He finished supper about 6.15. After supper, about 6.30 or 6.45, he was setting up card tables around the house. At the time

[fol. 16] of the accident he had gone back into the dining room. He didn't know what brought him back into the dining room, he just went in and sat down, just gazing out the window for no reason at all. The window did not have curtains on it. He first saw the plaintiff about for or five feet from the curbstone at the corner of Winthrop Street and Greenleaf Avenue. The plaintiff was just passing from the dirt part of the sidewalk to the cement part as it appears in the photographs; he had just put one foot on the cement walk. Witness didn't see the automobile at that time, but he did see it at the time of the collision. It came up the hill toward Boston Avenue and made a left turn. He observed it came around the corner at a pretty fast rate of speed—twenty to twenty-five miles an hour.

"Witness. Yes, it hit him with the left front fender of the automobile.

X Q. 1. The left front fender?

A. Yes.

X Q. 2. What part of the fender struck him?

A. It was coming around the corner like this; right about there.

X Q. 3. In here some place?

A. Yes, up front here.

X Q. 4. But at least you start here behind the front of the fender in your illustration; that is correct, isn't it?

A. Yes."

He could not say whether or not the automobile stopped and then started again and then went over to the tree by the time he came out of the house.

George E. Lawrence testified that he was a commercial photographer; that at the request of the plaintiff's attorney he made photographs of the locality at the corner of Winthrop Street and Greenleaf Avenue. At that time, in addition to photographs, he made measurements of the width of the street. The width of Winthrop Street at the corner of Greenleaf, from curb to curb, is twenty-two feet, two inches. The width of Greenleaf Avenue is the same.

THEODORE CHASE testified that he witnessed the accident at about 7.20 or 7.30 P. M. on October 31, 1931. He was standing on the sidewalk on Winthrop Street just opposite Greenleaf Avenue. He and a companion were going to Mr. [fol. 17] Gale's house. He first saw the defendant's car coming up Winthrop Street when it was twenty or twenty-five feet from the corner of Greenleaf Avenue. There was no other traffic on the street. There was no other car coming from that direction, no cars going in any direction in that immediate vicinity. When he first saw the defendant's car it was coming up along the right-handside of Winthrop Street about thirty-five miles an hour. The car slowed down to about twenty to twenty-five miles an hour as it turned into Greenleaf Avenue. Witness stated he could just see plaintiff stepping off the sidewalk at the corner. The plaintiff took about a step and a half before he was struck. He could not see what part of the car came in contact with the plaintiff because the car itself cut out so that he couldn't see. The car stopped in the middle of the street and then went over by the tree; it went about fifty feet after it struck the plaintiff. Witness remained there fifteen minutes or more until the ambulance came. The plaintiff appeared to be in a daze; he kept asking where he was. Witness heard no horn from defendant's car.

On cross-examination the witness testified that he and Warren Olsen, his companion, were waiting to cross Winthrop Street at the time of the accident. They were side by side, waiting for the defendant's car to pass. He did not remember whether Olsen was on his left or right, but he remembered that defendant's car came up Winthrop Street from his left. There was nothing to block his vision, no other traffic on the road. He found glasses lying on the sidewalk on the left side of the street after the accident. Witness had a clear view down the street. It was not very dark, although the lights were on. When he observed the defendant's car to be going thirty-five miles an hour it was down by Orchard Street, thirty-five or forty feet distant. The defendant started slowing down at Orchard Street, but was almost at Greenleaf Avenue when he had slowed down to twenty-five miles an hour. Witness was facing directly toward Greenleaf Avenue. Greenleaf Avenue is about the same width as Winthrop Street.

[fol. 18] WALLACE CLSEN testified that he was employed at the Hobbs Bowling Alleys, Somerville, Massachusetts, and that he was with the last witness, Mr. Chase, on the night of the accident. It was Halloween night. He was going to the Gales' house to a card party. When he first saw the defendant's car, it was just below the next street down Winthrop Street, that is, Orchard Street, which is about forty feet from the corner of Greenleaf Street. Its speed was about thirty to thirty-five miles an hour. He watched it until the accident happened, because he was waiting to cross the street. He saw the plaintiff on the other side of the street at the corner. He saw the plaintiff look around to the left and to the right, and step off, taking one step, ready to take the next one, when the car swung around the corner. The car came along Winthrop Street and shot off quickly on an angle. It lessened its speed before it swung, until at the time of going across it was traveling twenty to twenty-five miles an hour. The car stopped seventeen to eighteen feet from where it struck the plaintiff. The men in the car got out and carried the plaintiff over behind the car. The plaintiff was propped up against the tree near the car after the accident. He was in a dazed condition and groaning; he was asking where he was. Witness heard no horn as the defendant's car took the turn.

Witness on cross-examination testified he heard the police officer ask if anybody saw the accident. He told the officer he saw it, but the officer did not ask for his name. He later gave his name at the station. He further stated that as he and Chase started to go across the street Chase was on his right at about a forty-five degree angle.

"X Q. 1. Come down here and show me how you were. You place yourself. Where was he standing? Assume this is Winthrop Street. How were you standing? Is this the way?

A. Like this.

X Q. 2. So that the other fellow is standing facing up Boston Avenue; you are about like that?

A. Yes.

X Q. 3. There is no doubt about these positions, is there?

A. No."

[fol. 19] The first time he saw Mr. Dimick stop was just beyond the corner.

THOMAS DUFFY testified that he was a police officer in the City of Medford on October 31, 1931, as well as at the date of the trial. He saw the defendant at the police station on the evening of October 31, 1931, and talked with him. He observed the defendant's condition. The defendant's breath smelled of liquor, his eyes were glossy, and his speech was unsteady and rather thick. His gait was noticeably unsteady. He talked to the defendant about the accident. He placed the defendant in a cell and did not see him thereafter.

On cross-examination, the witness testified that he and Officer Binford were the officers who arrested the defendant. He was very close to the defendant when he smelled the liquor. He went to him for the purpose of making a test of his breath; he asked the defendant to blow his breath so he could smell it. He asked the defendant questions which the defendant hesitated before answering. He asked the defendant if he was driving the car and the defendant hesitated a few seconds before saying that he was. He asked the defendant if he had been drinking and the defendant hesitated half a minute before answering "No."

"X Q. 1. Well, was he staggering now?
A. You wouldn't call it staggering. He was noticeable.
X Q. 2. In what way?
A. Why, in his movements.
X Q. 3. What was noticeable about his movements that led you to believe he was under the influence of liquor?
A. Well, he was not steady.
X Q. 4. In what way, swaying sideways, forward?
A. He wasn't swaying all over the floor.
X Q. 5. Well, was he swaying part way?
A. He was a little unsteady on his feet.
X Q. 6. Did he ever go from side to side or did he ever go forward or back or how?
A. Swaying, unsteady.
X Q. 7. Side to side, or what way was he swaying?
A. I don't know."

He did not prosecute him for driving under the influence [fol. 20] of liquor. It is a little over a mile from the scene of the accident to the police station.

WILLIAM BINFORD testified that on October 31 ,1931, as well as at the date of the trial, he was a police officer in the City of Medford. He remembered the defendant and his companion being brought into the police station October 31, 1931. On that night, he and Officer Duffy were motorcycle officers detailed at the station to await emergency calls. He saw the defendant, who was seated when the witness questioned him about the accident. The defendant's breath smelled strongly of liquor; his statements were incoherent; he was unsteady on his feet, swaying slightly. He was in a happy mood, laughing. When questioned he would hesitate and kind of laugh about it. He said, laughing, that he was going to a Halloween party.

On cross-examination, witness testified that he did not see Dimick brought in to the station. Dimick was turned over to the witness and Officer Duffy in the guard room. The defendant gave a report of the accident in the presence of the other officer.

"X Q. 1. There was nothing hesitant about what he did say, was there?

A. Yes, surely.

X Q. 2. He did?

A. Yes.

X Q. 3. Did he hesitate on all those various items?

A. On most all of them. He was in a happy mood, laughing all the time.

X Q. 4. Because he was in a happy mood, that wasn't the reason you drew any inference that he was under the influence of liquor, that in and of itself?

A. No.

X Q. 5. You didn't prosecute him for being under the influence, did you?

A. No."

DR. RAY T. MACDONALD testified that he had been a practicing physician in Medford for fourteen years. He had never treated the plaintiff before October 31, 1931. He had treated the plaintiff's niece. He was called to see the plaintiff at the Lawrence Memorial Hospital on November 2d by Mr. Jones.

He found the plaintiff lying in the hospital bed. When [fol. 21] the doctor was getting the history of the accident the plaintiff seemed a little slow and sluggish in his answers.

He was complaining of pain in both knees, but principally the right knee. There was ecchymosis of black and blue marks on both knees, but more so on the right. He was complaining of a great deal of pain in the right knee; had difficulty in making the motions of the knee which caused him pain. The plaintiff told him he had been struck by an automobile and didn't know about being brought to the hospital. Subsequently, he complained of pain in his head, an indefinite feeling in his head, and he seemed to be confused. He complained of his knee, a constant pain and difficulty in motion. The plaintiff gave the witness the symptoms about his head after he came home from the hospital. The witness diagnosed the injury to the right knee, with the help of the Xray, as being a fracture of the spine for the attachment of the crucial ligament of the right knee. There was a fracture of the joint of the knee. The doctor treated it by bandaging and by advising an elestic knee support. He advised the plaintiff to favor the knee all he could and for a while kept him in bed at home. He then got him up, thinking there would be less stiffness in the knee if he carefully let him regulate his motions in walking. The treatment ran down to December 28, 1931, the last time he saw the plaintiff at home.

In April, 1932 witness started baking the knee. The plaintiff was complaining still of the stiffness and pain in the knee and sort of lacking control. The doctor thought that there might be some adhesions or still some inflammatory condition in the joint that the heat would ease and would help him. In a fracture in a joint, there is likely to be more or less roughness and irritation which causes an inflammation, and this ligament in the plaintiff's leg probably was injured at the same time and would cause some pain and stiffness. The plaintiff told him that he would be walking and his leg would seem to give in; he couldn't seem to control it. That was something which, in the doctor's opinion, might or could follow from that injury. He baked the knee [fol. 22] for a while, but the plaintiff was still complaining of the pain and inability to stand the knee.

The doctor figured that he had done what he could, so he told the plaintiff he would like to have him try massaging and sent him to a masseuse. The last time the doctor saw him was August 3, 1932. At that time the doctor formed the opinion that the plaintiff's knee was permanently dam-

aged. This would consist of stiffness of the knee. The plaintiff seemed to hold the knee in a sort of semi-flexed position and he was unable to straighten out the joint to extend it. He judged the limitation to be one-quarter to one-third. His opinion was that there might be some improvement as to pain, but that the plaintiff had a permanently damaged knee that would be a bother to him for the rest of his life. He knew that the plaintiff's occupation had been as a cook.

Assuming the plaintiff's condition was the same as when he last saw him, he would say that the plaintiff couldn't do that type of work, being on his feet so much. The only kind of position he could hold would be one where he could sit down. During the time the plaintiff was under the doctor's observation, he complianed of pain in his head, said he couldn't think straight, seemed to be a little sluggish in answering questions. It took quite a little time to bring out to him the force of the question that you wanted to get at.

Assuming that the plaintiff had been knocked down by an automobile and thrown to the ground, that he received an injury to his head, and there was a mark on his head and pain at the hospital, and also black and blue spots on both knees, the witness would say that this condition in which he found the plaintiff was one of which the accident might be the adequate cause. From the history the doctor received of the head condition at the hospital, he formed the opinion that the plaintiff received a concussion of the brain at the time of the accident. The systems given the doctor, the dizziness and head condition described, were such as would follow the concussion. The accident described would be an adequate cause of the concussion. At the plaintiff's visit to the doctor on April 8, 1932, concerning the plaintiff's condition at night, he complained that his knee was still painful and stiff, that he could rest at night only on the right side. [fol. 23] The reflexes on that side were hyperactive, over-active.

On cross-examination, witness testified that when he saw the plaintiff on his return from the hospital, he found the reflexes on the right over-active. Then he examined plaintiff's heart and found that it was slightly enlarged.

"X Q. 1. Will you show me the notes that you used November 14 that say anything about reflexes exaggerated when you made that examination?

A. November 14, no, I have no notes.

X Q. 2. You have no notes. No; 40 *forty* days later you made an examination of him, didn't you? Then you found the reflexes over-active?

A. Apparently did.

X Q. 3. Have you got the notes for the 40 days later?

A. The only notes that are here are after he started coming to my office.

X Q. 4. So that you have no notes at all showing he had added reflexes until the following April?

A. No."

"X Q. 5. He is pale enough to cause you to believe that he was anemic to some degree?

A. I should figure if a man is suffering or confined in the home, is suffering, that he might be pale.

X Q. 6. But also, a man if anemic will have a look similar to the look he has right now; isn't that so?

A. With reservations, yes.

X Q. 7. If a man is anemic that produces weakness, doesn't it?

A. Yes.

X Q. 8. And weakness would produce dizzy spells, wouldn't it?

A. Yes.

X Q. 9. And trouble with the heart, if that is a chronic condition, would produce trouble with the brain, wouldn't it, to some degree?

A. Trouble with the brain, what do you mean?

X Q. 10. Dizziness.

A. Surely, in some of the heart conditions.

Francis D. Donoghue testified that he was a physician and surgeon, practising in Boston. He was graduated from Harvard Medical School in 1894, was private assistant of Dr. Samuel Mixter for ten years, was surgeon of the Boston Dispensary for 15 years, instructor in surgery, Tufts College, about the same length of time. During the last 25 [fol. 24] years he had been connected with the Industrial Accident Board of Massachusetts, two years as medical examiner and the rest of the time as medical adviser to the examiner. During that period he had carried on general surgical practice with various other appointments; and had represented the Commonwealth of Massachusetts by ap-

pointment of Governor Foss and the United States by appointment of Presidents Coolidge and Hoover.

Dr. Donoghue examined the plaintiff at the office of his attorney the day before trial. His examination was a general examination with special reference to the condition of the right knee. He found the plaintiff to be of poor color. The plaintiff gave a history of his occupation as a cook. He had the appearance of having lost weight. His pulse was slow, not strong, of poor quality, but regular. His heart was enlarged so that the apex beat was in the medial line. The heart sounds were weak but there were no murmurs that the doctor could determine. It was a general heart weakness. His mental attitude was the slow responding type, he hesitated in answers apparently both because of language difficulty and trying to think. There was no definite alteration in his reflexes. The right knee jerk was more active than the left and that was probably because his knee was partially stiff. There was no definite tipping over when he stood up and there was no other abnormal reflex. The question of the reaction of his eyes to distance was a little doubtful, but they reacted to light.

The examination of his knee showed the knee was held in a position of partial flexion; that is, the leg is bent and cannot be fully extended. When the knee is taken and pressure is great to bring it back, there is what is known as elastic resistance, that is, as though the thing that obstructed was not bone but was the type that comes from adhesions inside the joint. The result is that when the plaintiff walks he walks rather dragging his leg. It doesn't swing properly and there is evidence in the appearance of his shoes that he kicks the right toe as he walks. That is consistent with the stiffness of the knee. As to the reason why there were adhesions inside the plaintiff's knee, the [fol. 25] doctor's opinion was as follows: He received a history of an injury to the knee with fracture of the spine of the tibia. The ligament injured was the crucial ligament. Crucial means cross ligament. At the top of the shin bone, called the tip, as the shin bone comes up to the knee and that tip makes a bearing place for the thigh bone to rest on, there is a little bone on the outside that serves as an attachment or guide so the leg doesn't wiggle, but it has nothing to do with the bearing of the big bone in the leg on which you stand.

Below the knee is the other bone known as the fibula. On top of the shin bone are two pieces of bone sticking up, to which is attached a ligament. Attached to each of these pieces in the first place is the margin of a cartilage known as the semilunar cartilage, on either side of the top of the knee joint, so that the knee joint not only is a range joint, to and fro, but with the leg bent the lower part can be turned under near this cartilege. Taking the upper part of the leg, toward the thigh bone, on top of the shin bone there are what are known as crucial ligaments going up, caught on the thigh bone. These are known as crucial ligaments or cross ligaments inside of the knee to prevent lateral motion at the knee joint.

In the plaintiff's case apparently the anterior crucial ligament was broken off. In healing, so far as bony healing was concerned, it left adhesions that make this interference with the complete stretching, straightening of the plaintiff's leg. There is not much that a doctor can do with such a condition except to have him use the leg as far as he can to stretch out the adhesions as much as possible.

There was nothing in the plaintiff's history other than the accident which might be a cause of any of the conditions that the doctor found. As far as the plaintiff's work as a cook is concerned, his leg would feel tired if he stood on it any length of time. If he had a job where he could ease himself if the leg got tired he would be able to do a considerable amount of work as far as that leg is concerned. As far as the leg condition is concerned, he would be able to do a great deal. His general condition is poor. He has general weakness which is not due to his knee. It may be [fol. 26] associated with the result of the concussion or it may be associated with some other general condition.

The accident was sufficient to knock him out of his work and he is not able to get back into it. The knee and concussion of his brain incapacitated him for work. The plaintiff has a permanent disability of his leg. He cannot do any work except that which can be done sitting down; he would be handicapped for any work that called for being on his feet regularly. The rotation of the plaintiff's lower leg is limited about two-thirds. If there was lack of control, that would probably be due to the habit of not using the leg incident to the stiffness of the leg from the break in the joint.

Cross examination:

"X Q. 1. Doctor, would you say that this man is the picture of one being bothered with anemia?

A. Well, the picture of one being bothered is a difficult question to answer.

X Q. 2. Would you say he was?

A. I would say he probably was.

X Q. 3. You found a man that looked anemic to you probably, primarily or secondarily?

A. I wouldn't say he looks anemic. He has got a pallor that is entirely consistent with the work of a cook. If he wasn't a cook I would say he looked anemic. He has got the pallor of a cook.

X Q. 4. And that is the usual pallor that cooks have, is it?

A. Yes.

X Q. 5. That he has?

A. Yes, they do under the Volstead act."

NICHOLAS STUHL testified that he was manager of the Winter Place Hotel and had been there thirty-nine years. The plaintiff had worked for him there before the accident seven years or more. He was a cook and worked regularly. The plaintiff was laid off at the time of the accident because of seasonal slackness. In the fall, November, he wanted the plaintiff back because business began to pick up again. Before the accident the plaintiff was a *a* very handy man; he could be put anywhere, to broil, to roast, anywhere. He was quick in his movements, always running. His wage [fol. 27] was $24 a week, with all the meals he wanted. Since the accident he has noticed that the plaintiff can't get around, can't work.

On cross examination the witness testified that his business is seasonal, always slow in the summer, but increasing in the fall around November. At the time he laid off the plaintiff, he had also laid off three waiters, two women and another man in the kitchen. But he told the plaintiff he would take him back when the summer season was over. He had not sent for him up to October 31st. He would have taken him back because there were several chances up there, even if he would have had to let another man go to take him anyhow.

JOHN J. HAYES testified that he was a janitor at 2 South Cedar Place, Boston, and had rented a room there to the plaintiff for about ten years and that he had known the plaintiff for that time. He knew of the accident. In his opinion the plaintiff had the appearance of having aged ten years since the accident—he had grown delicate and old looking, and had lost weight. Every night for almost ten years the plaintiff had stopped in on the way home from work to talk and smoke with him. Now the plaintiff's mind is different, neither his mind nor his limbs seem to be as accurate as they were. He noticed the change in his mind in talking to him.

SAMUEL JONES testified that he resided at 21 Orchard Street, Medford; that he was the husband of the plaintiff's niece. The plaintiff did not live with him prior to October 31, 1931, but came to visit practically every Saturday to stay over Sunday. He was on a visit at the time of the accident and had lived with the witness since the accident. Witness and his wife were out shopping at the time of the accident and knew nothing about it until around eleven that night.

About that time he went to the hospital to see the plaintiff, who was in a very dazed condition. After the period when the plaintiff was in the hospital, witness took him home. Then he was in bed for a period. When the plaintiff first came home he wouldn't talk much—he seemed to be dazed [fol. 28] at first. You would ask him a question; he wouldn't answer, as though he hadn't heard; he would just sit and stare, in a daze. In fact, he was still that way at times. One Sunday in December, 1931, when the plaintiff rose from the chair in which he had been sitting in the kitchen, to go to bed, he fainted, falling against the wall.

The witness observed a change in the plaintiff since the accident, both in weight and mentally. The plaintiff was not as friendly as before. Sometimes he would go half a day without speaking as though angry. When witness said "Good morning" to him, maybe he would answer or maybe not for no apparent reason. The children in the house seemed to irritate him a great deal since the accident although before he used to go out walking with the children a great deal taking them up to the Mystic Lakes. Now any little noise—the children or the radio—would irritate him.

On cross-examination witness testified that before the accident the plaintiff used to think more quickly and more accurately.

Martin J. Lane testified that he lived at 17 Orchard Street, Medford, which is about two minutes walk from Greenleaf Avenue—about sixty-five or seventy-five feet. He had known the plaintiff about nine years prior to the accident. Witness was a clerk for the elevated. He knew the plaintiff well before the accident and had talked with him probably two or three times a week since. He noticed a difference in the plaintiff since the accident; he had lost a great deal of weight and had changed in his carriage and in his walk which was now dragging. Before the accident they used to hold quite a conversation; now the plaintiff would frequently come into witness' house and sit down. He would answer questions slowly, but wouldn't talk otherwise.

Dr. Whitman King Coffin testified that he is a physician, that he takes X rays in connection with his practice. He is roentgenologist at the Lawrence Memorial Hospital. At the request of one of the doctors at that hospital he took X ray pictures of plaintiff's right knee. The pictures were marked as "Exhibits 8" and "9". The X ray showed a [fol. 29] fracture through the attachment of one of the spines of the tibia to the tibia itself. This was the right knee. There was an X ray of plaintiff's skull which was negative.

Dr. John H. Hodgson testified that he is a physician and surgeon; that he has specialized in neurological surgery, which is the surgery of the brain and the spinal cord and the nerves. He was graduated from Harvard Medical School in 1915, had a surgical interneship at the Massachusetts General and Peter Bent Brigham Hospitals in Boston; was resident surgeon at the Massachusetts General Hospital before the war; was abroad two years during the war doing surgical work, first with the 14th Engineers, and then with the Massachusetts General Hospital Unit. After the war he came back as resident surgeon at the Massachusetts Gen-

eral Hospital for about a year and since that time has been on its visiting staff in the Department of Surgery and is now assistant visiting surgeon, associated in neurological surgery, which has to do with surgery of head injuries, brain tumors, etc., with Dr. Mixter, who is chief of that department. He is consultant at the Massachusetts Eye and Ear Infirmary and in numerous hospitals outside of Boston, such as the Lawrence Memorial, the Winchester and Chelsea Memorial as well as Arlington, Palmer Memorial in Boston, and others. He is on the faculty of the Harvard Medical School, and instructor in the Department of Surgery in the course for graduates.

He examined the plaintiff at his office December 24, 1932 with just plaintiff and himself present. He obtained a history of plaintiff's complaints, then made a general physical examination, and then, in addition, a neurological examination, which is an examination of the nervous system, in addition to the general examination that is ordinarily made.

Concerning the history of his complaints, plaintiff had no direct knowledge of just what happened but he understood afterwards that he was struck and knocked down by an automobile. He was rendered completely unconscious, but did not know for how long. On coming to, he was in the Lawrence Memorial Hospital in Medford and someone was try-
[fol. 30] ing to get his name and address. Everything seemed blank and he couldn't see. He remained at the hospital for about ten days. His memory was distinctly hazy for all these events. After leaving the hospital he went to the home of A. J. Jones of Medford and was attended by Dr. Ray T. MacDonald of Medford until July or August of 1932. Dr. MacDonald gave him baking treatments to the right leg. He was also treated by a Swedish masseuse about twenty times, the last time in November 1932. He hadn't worked since the injury.

Plaintiff then related his complaints. There was weakness in the right leg. Plaintiff stated he could not straighten the right knee and had no control of the right leg, whereas the left was all right. He used a cane constantly when out of doors. He complained of pain in the outer side of the right thigh. This pain went down the leg behind the knee and then down the outer side of the lower leg into the foot and the last three toes. It was a dull but not a constant pain. If he walked a little the leg got tired and heavy and began to pain. Plaintiff dragged the leg and it jumped a lot.

The leg never felt comfortable. Plaintiff could not rest it. Sometimes it would not move at all. Again, it would move when he did not want it to and he was not able to control it. However, he had walked as far as two miles some days. The pain in this leg formerly kept him awake at night, it still did, but not as often.

Plaintiff didn't sleep well and had to keep pulling the leg over to get comfortable. There was no numbness and no definite wasting of the muscles of the leg. The palms, hands and left leg were all right. There was no shaking of the hands. Plaintiff was right-handed. Vision was good. Plaintiff wore glasses for reading, as before the accident. He lost his glasses at about the time of the accident but was not sure whether he was wearing them or not. Hearing was about as good as before the accident. Plaintiff complained of a funny feeling through the right side of his head, down in back and above the ear. He did not consider this a headache exactly but rather a soreness. It has been present very much since the accident and has not changed in degree. [fol. 31] It worried the plaintiff at times. There was no generalized headache.

Plaintiff also complained of dizziness which has been present since the accident but remains the same in degree. It came mostly when he laid his head backwards and lasted several seconds. Plaintiff had it sometimes when he was standing up. Plaintiff did not have it very much, but sometimes twice in one day. A year ago plaintiff staggered towards the left and leaned against a door but did not fall. Otherwise there was no staggering or falling. His memory was not as good as before the accident; he now forgot easily. He had become unstable and nervous and the least thing now bothered him. He could not stand noise and wanted to be alone a great deal. He was now gloomy all of the time, but had not been before the accident. His appetite was poor and he had lost 20 pounds. There were no other complaints.

The plaintiff's past history was that he had always been well. He had had no serious illness previous to the accident, nor operations. He had pleurisy eight years earlier and had been home five days on account of it. Had no venereal diseases. The plaintiff was born in Lorraine and had been in this country steadily since 1893. He was a cook by occupation and had worked steadily until June or July 1931, but not between that date and the date of the accident because no work was then available. He had worked for a number

of years in the Winter Place Tavern; had never been laid off before and had been requested two or three times since being laid off to go back there to work. He smoked a pipe and did not use alcohol.

The doctor's physical examination revealed a fifty-five year old white single man who spoke English fairly well, slow to understand and to respond and seemed somewhat retarded mentally. He had a rather blank expression, was of medium height and at the time of the examination weighed 150 pounds. He was somewhat emotional at times and tears came to his eyes on one occasion. He walked very slowly and used a cane. He always dragged the right foot. The gait was abnormal. There was dragging of the right foot and the right leg shook a great deal sometimes.

[fol. 32] At times the right leg hung back and didn't come forward as it should. At times when he placed the foot down it stamped. He stated that he had no strength to pick up this leg. He got up from the chair slowly and held on to it to steady himself. He stated he was afraid to bear weight on the right foot. He bore his weight on the left leg, not much on the right, and the right knee was held in a slightly bent flexed position.

There was slight anxiety in the Romberg position, but no definite swaying. That is, when asked to stand straight with his feet closed together and his arms to his side and with his eyes closed, to see whether he was steady in that position as a normal person is, he seemed anxious, apprehensive lest he not be able to do it, but there was no actual swaying. There was no atrophy of the leg and no tenderness. The areas of pain described in the right leg were not tender, the complaint being subjective, that is, within himself, nothing objective to show for it in that respect, that is in tenderness at least.

There were moderate varicose veins in both lower legs. There was a fine tremor of the hands. Reflexes and sensations of all kinds were normal throughout the body; that is, reflexes in the right leg and in other part- of the body were present and normal. Neurological examination as a whole was negative. The witness made a diagnosis of his condition at that time. The plaintiff had received concussion of the brain at least of moderate degree and there might have been even greater injury than that, especially in view of his subsequent complaints.

He was retarded mentally, somewhat emotional and not clear as to what had happened to him, and did not seem to fully appreciate his condition since the accident. As a result of the symptoms he gave and the condition in which the doctor found him he formed the opinion that his complaints were in part due to the concussion; the complaints of headache and dizziness and the other symptoms referable to the head were the result of concussion. Of course, the leg condition was something else.

In an indirect way the concussion was responsible for the loss of weight. There was no connection between brain in- [fol. 33] jury and the injury to the leg, but the doctor formed the opinion that there was incapacity in that leg including the knee, which constituted a definite handicap. The leg condition was one of instability of the right knee. From the doctor's own opinion rather than from what plaintiff told him, he believed the plaintiff had been incapacitated right along from the date of the accident up to the time of the examination. The doctor felt that the disability which had lasted up to then was likely to go on indefinitely—for a long time.

On cross-examination the witness testified that whether or not the plaintiff was emotional before the accident he didn't know from observation, just from what the plaintiff told him.

"X Q. 1. Do you think, doctor, that he will be emotional after this case is over?

A. I should expect so; yes.

X Q. 2. Have you in your experience, doctor, found that injured people cease to be emotional when they know the impending matter is finished?

A. That sometimes happens, sir.

X Q. 3. But you say that would not apply to his case?

A. I felt that that was not a factor in his case; that he was emotional because of what happened and the way he felt rather than because there was a suit pending. I may be wrong but that was my impression of him."

The defendant, David Dimick, testified that he was twenty-two years old; that he had come from Portland to Medford on the day of the accident to see friend of Mr. Hanson who

was in the car with him. These people lived on Greenleaf Avenue, Medford. After he had been there, he went up to a store on Boston Avenue. After leaving the store he turned down Winthrop Street, and drove down that street until he was 20 feet from Greenleaf Avenue. He put out his hand and blew the horn. He was five or six feet from the curb. When he was 20 feet from Greenleaf Avenue his lights just about struck the plaintiff walking up the sidewalk. The plaintiff was just about to get on the cement part of the sidewalk. The defendant turned into Greenleaf Avenue just as the plaintiff stepped off the curb. The next thing the defendant knew he felt the impact. He didn't [fol. 34] know on what part of his car it was. It was in behind where he was sitting. The defendant stopped within about a car's length and pulled over to the side of the road, got out and went back to help the plaintiff, and walked over to his car with plaintiff, helped the plaintiff walk to his car. The officer who came with the patrol wagon told him to report immediately at the police station. The defendant then drove down to the police station.

On cross-examination the defendant admitted that he was the person who pleaded guilty and was found guilty and ordered to pay a fine of $35 for operating a motor vehicle negligently so that the lives and safety of the public might be endangered. He stated that he had not been drinking on the night of the accident, not a drink, not even a smell. He and his friend Hanson left Portland, Maine, that afternoon to go — the friend's house on Medford Hillside. He had a rough idea where the place was through discussing it with Hanson. Hanson was going to take him there. He did not know the people he was visiting at Greenleaf Avenue. There was a gentleman, his daughter-in-law and her husband. He reached the house from Portland about 7 p. m. He did not see or communicate with these people to have them come to court to testify for him. At the time of the accident, out of the corner of his eye, he saw the plaintiff take a step off the curbing. This was not backwards, after defendant had passed him. The plaintiff had taken a step off when the defendant reached the corner. At the time plaintiff walked into the rear of his car, defendant said, his front fender was just by the end where the crosswalk would be. The plaintiff left the sidewalk to come out toward the defendant. The defendant did not put on his power; he did

not stop. He thought plaintiff would hesitate; he did not think he would stop. Defendant continued at the same speed until he heard the jolt in the back.

"X Q. 1. Did you see these boys who testified this morning in court when you got out of your car and went over?

A. I wouldn't recognize them.

X Q. 2. There were some boys there, young men about your own age?

A. When I got out of the car?

[fol. 35] X Q. 3. Yes.

A. No, I didn't see them."

He assisted the plaintiff across the street to a place right up behind defendant's car. The officer's testimony that he laughed in answering questions was not true, nor was the officer's testimony that he was incoherent. He talked clearly. The officers were incorrect in saying that they smelled liquor on his breath.

In answer to questions by the court, the defendant said that each of the officers asked him if he had been drinking and in the presence of both officers, one asked him to blow out his breath and he did so. The day before trial the defendant rode down from Maine with Hanson, who was in the car with him on the night of the accident, but he did not bring him to court to testify. He did not know where Hanson was on the day of the trial. He saw him at the office of the defendant's attorney the day before the trial. He did not tell him to come to court. That was not the last time defendant saw him.

Dr. Harry R. Bolan, called by the defendant, testified that he was a practicing physician in Boston. He was a graduate of Middlesex College of Medicine and Surgery with two years' experience at Middlesex Hospital, special work in Massachusetts General Hospital and Bellevue Hospital, New York, New York.

He examined the plaintiff November 25th at his home. His diagnosis was cerebral concussion and a fracture of the small spine on the inner surface of the head of the tibia, contusion of the right knee. He examined plaintiff's heart and found at that time that plaintiff had a low pitch

systolic murmur of the heart over all the valve areas, but he thought that plaintiff's compensation was pretty good. His blood pressure was 135/75 millimeters of mercury; pulse was regular, fair volume. He would say the heart condition was one of long duration. That was all he found in regard to the heart. He found marked tenderness on the inner surface of the joint of the right knee, with pain on any flexion of the leg. At the time of his examination there were no external marks of injury on the knee or the leg; no scarring, no swelling. About one-third of the normal flexion of the leg was possible without too much pain. [fol. 36] Any motion was slightly painful. The plaintiff walked slowly and carefully, with the aid of a cane, with a marked limp. He could not detect any thickening of the underlying tissues. The doctor saw the X-ray which showed a crack just at the base of the small spine. The doctor made a second examination December 28th and found a fine tremor of both hands and exaggerated reflexes in the right leg. The doctor could obtain full flexion of the leg by exerting his own force on it. There was pain on full extension. The plaintiff still walked with a limp and used a cane.

At the time of his second examination, approximately nine weeks after the accident, the doctor thought the plaintiff could return to work in a month or six weeks.

On cross-examination the doctor testified that he had not seen the plaintiff since that time.

"X Q. 1. Is it common in a fracture of this sort to have adhesions after the healing of the fracture in the joint?

A. I would not say it was common; no.

X Q. 2. Is it uncommon? It is not uncommon?

A. It is not usual at all.

X Q. 3. It is not uncommon to see them?

A. I should say it was rather uncommon; yes.

X Q. 4. Would you say that, in this case, after the fracture healed that there could not possibly be adhesions that would interfere with the flexation of the knee?

A. Oh, adhesions are possible.

X Q. 5. So that it would not be a startling statement?

A. No."

At the time of his first examination flexation of plaintiff's leg was possible to the extent of about one-third of normal —in other words there was a restriction of two-thirds. The

doctor didn't think it would be of any advantage to make an examination between December 1931 and the date of the trial. Assuming that there were adhesions that interfered with the motion of that leg, they would not be very painful at the date of the trial. Perhaps they would be on forced flexation. It was too late to have much pain there. Forced [fol. 37] flexing would be attempting to break up those adhesions. The witness didn't think plaintiff had any pain at the date of the trial.

If there were adhesions and restricted motion at this time, whether or not they would continue indefinitely would depend upon the man's attitude towards his condition and as to how much he used the leg. If the adhesions have been there for a year it would take a little time to break them up and get adequate motion in the knee.

The doctor did not think that the time was past when it would be possible. He thought it would be fully possible if plaintiff would be willing to go through the exercises and take the proper form of treatment—he could get a little more adequate motion in the knee. He certainly did recommend to plaintiff the use of the knee. When plaintiff attempted to walk half a mile to Dr. MacDonald's that would be not at all contrary to the doctor's advice, but plaintiff took two hours to do it; there was the trouble. The doctor didn't think he pushed himself enough. He ought to hustle to give that knee all the action it possibly could get. If the adhesions were there, the doctor would say that after a year and a half there would be some doubt of their disappearing right away. The future as to that knee might be called somewhat indefinite. The prognosis would not be so very bad if he had the proper treatment.

In the two examinations he made he had confidence in the statements the plaintiff gave as to his condition. He did not think the plaintiff was feigning. As to the head injury, even a concussion of moderate intensity is very commonly followed by dizziness. The plaintiff reported dizziness to him. If plaintiff told him that the dizziness continued and occurred at the date of the trial—it would be a long time to think that dizziness would proceed for fifteen months after an injury. Of course the dizziness that plaintiff complained of was at the second, not at the first, examination. The dizziness sometimes occurs weeks but not years after the trauma application.

The date of the doctor's first examination was November [fol. 38] 26th and the second was December 28th. It was not surprising that plaintiff did not manifest dizziness on November 26th, twenty-six days after the accident. Headaches are also a result of concussion and the plaintiff told him he had them. He had heard plaintiff state in court that these headaches have continued. He would not expect that fifteen months afterwards. A headache due to ordinary concussion lasting fifteen months would be uncommon.

Up to within two or three weeks after the accident the results of a concussion or injury to the head would be uncertain. In that period you might get secondary symptoms. The duration of the symptoms is also something which cannot be predicted for a certainty. He wouldn't say that a slowing up of the mental condition naturally follows a concussion. The plaintiff did not tell him that he had difficulty with sleeping. Irregularity of sleeping might result from concussion. The plaintiff has lost a good deal of weight since the doctor examined him.

The plaintiff was of a sallow color when he saw him. From what the doctor saw, he would doubt that the plaintiff has the ability to get around as he probably has before the accident. It is very common that after there is a trauma, a blow which produces the concussion, that the patient when he is first seen directly after the accident has a hazy recollection of what happened; and that same hazy recollection continues whenever his attention is directed to the period directly after the accident.

On redirect examination the doctor testified that many factors enter into irregularity of sleeping. Fatigue will also come from leaky valves of the heart.

Recital as to Exhibits

Exhibits 1-10 inclusive, as follows, are made part of this bill of exceptions and may be referred to:

1. Photograph of locality.
2. Bill, Lawrence Memorial Hospital, November 9, 1931, $50.
3. Bill, Lawrence Memorial Hospital, January 16, 1932, $10.
4. Bill, Dr. Ray T. MacDonald, December 19, 1931, $12.

5. Bill, Mrs. Gerda Harold, $40.
6. Photograph.
[fol. 39] 7. Photograph.
8. X ray film.
9. X ray film.
10. Record of David Dimick in First District Court of Eastern Middlesex.

The above is all of the evidence material to the bill of exceptions.

The case was submitted to jury, which returned a verdict for the plaintiff in the sum of $500.

The plaintiff then duly filed a written motion for a new trial, a copy of which is annexed hereto, marked "A" and made part hereof.

After the motion for a new trial was duly argued by both counsel, the court made the order on motion for new trial, a copy of which is annexed hereto marked "B" and made part hereof.

The defendant then, within the time named in the order, filed the stipulation a copy of which is annexed hereto marked "C" and made part hereof.

The plaintiff duly claimed an exception to the said order, the copy of which is annexed, marked "D".

The plaintiff claiming that he is aggrieved by the said order hereinbefore referred to, now brings this his bill of exceptions and prays that it may be allowed.

By his Attorney.

Richard J. Cotter.

[Memorandum. Copies of motion for a new trial, order on motion for a new trial, stipulation and claim of exception, marked respectively "A", "B", "C" and "D" and attached to the original plaintiff's substituted bill of exceptions, are here omitted as they already form part of this transcript of record. James S. Allen, Clerk.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING BILL OF EXCEPTIONS

August 22, 1933. The within bill of exceptions is allowed.

Hugh D. McLellan, District Judge.

[fol. 40] Assented to.

Leo. P. Doherty, Attorney for Defendant. Richard J. Cotter, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

From the aforementioned judgment, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the plaintiff on the fifteenth day of November 1933, and allowed by the court on the same day.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 15, 1933

1. The court erred in making the order on plaintiff's motion for new trial that the motion should be denied if the defendant would file a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500 on or before April 21, 1933.

2. The court erred in denying the plaintiff's motion for a new trial upon the defendant's filing the stipulation required by the court's order on the plaintiff's motion for a new trial.

3. The court erred in denying the plaintiff's motion for a new trial based on the ground that the verdict found by the jury for the plaintiff in the sum of $500 was against the evidence and the weight of the evidence.

4. The court erred in denying the plaintiff's motion for a new trial based on the ground that the verdict found by the jury for the plaintiff in the sum of $500 was a compromise verdict and illegal.

5. The court erred in denying the plaintiff's motion for a new trial based on the ground that the damages found by the jury in the verdict of $500 for the plaintiff were inadequate.

6. The court erred in entering judgment for the plaintiff in so far as the amount of said judgment was determined

by the defendant's stipulation filed in accordance with the court's order on plaintiff's motion for new trial.

[fols. 41 & 42] Wherefore, the plaintiff prays that the judgment of the District Court may be reversed.

By his Attorneys.

Warner, Stackpole & Bradlee, R. J. Cotter.

RECITAL AS TO BOND AND CITATION

On the fifteenth day of November, 1933, a bond on appeal for costs in the sum of two hundred fifty dollars ($250) was filed by the plaintiff, the Globe Indemnity Company acting as surety, and said bond was approved by the court on the same day.

A citation on appeal was issued on November 15, 1933, being made returnable in the United States Circuit Court of Appeals on December 15, 1933. Service of said citation was duly acknowledged by counsel for David G. Dimick.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1933

No. 2884

PETER SCHIEDT, Plaintiff, Appellant,

v.

DAVID G. DIMICK, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Wilson, Morton and Morris, JJ.

OPINION OF THE COURT—Filed April 20, 1934

WILSON, J.:

The plaintiff-appellant brought an action to recover for injuries caused by the alleged negligence of the defendant-

appellee in operating his automobile. The jury found that the defendant was liable and awarded damages in the sum of $500. The plaintiff filed a motion for a new trial on the ground of inadequate damages.

The trial judge denied the plaintiff's motion, the defendant having consented to a stipulation that judgment be entered against him for $1,500, or an increase in damages of $1,000 over that awarded by the jury. The trial judge based his rulings on the authority of two cases in the state courts: Gaffney v. Illingsworth, 90 N. J. L. 490, and Carr v. Miner, 42 Ill. 179.

But the issue is whether under the Seventh Amendment [fol. 44] of the Federal Constitution a federal district judge, in a common law action, may re-examine the facts and, against the protest of the plaintiff, deny a motion for a new trial by the plaintiff on the ground of inadequate damages, provided the defendant consents that judgment be entered for an additional sum fixed by the court.

Notwithstanding the great respect we have for the well-considered rulings of the judge presiding below, we think that the cases cited do not warrant the action taken in this case. The action in the case of Gaffney v. Illingsworth was based chiefly on a rule of the Supreme Court of New Jersey; and the case of Carr v. Miner was taken merely to correct an omission of a definite item of damage, as in the case of Clark v. Henshaw Motor Co., 246 Mass. 386. In any event, whatever may be the practice in the state courts, it is not sufficient ground for sustaining similar action in a federal court, United States v. Train et al., 12 Fed. 852; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291; Minneapolis, etc., Ry. Co. v. Moquin, 283 U. S. 520, 521, and the Seventh Amendment of the Federal Constitution, we think, prohibits such action in the federal courts.

The Seventh Amendment provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined by any Court of the United States than according to the rules of the common law."

Justice Story, in interpreting this Amendment in Parsons v. Bedford, 3 Peters 433, 446, 447, 448, said:

"The only modes known to the common law to re-examine such facts, are the granting of a new trial by the

court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law'."

[fol. 45] In the case of Capital Traction Company v. Hof, 174 U. S. 1, 7, the court said:

"A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

"This conclusion has been established, and 'the rules of the common law' in this respect clearly stated and defined, by judicial decisions."

The Supreme Court in the last cited case quoted with approval the language of Judge Sprague in United States v. 1363 Bags of Merchandise, 2 Sprague, 85, 87:

"'* * * at the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil causes that the court might, in its discretion, set aside a verdict. * * * because each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted."

Also see Liberty Oil Co. v. Condon Bank, 260 U. S. 235, 243.

The only federal statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:

"All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law."

The remainder of the section, in view of the Seventh Amendment, can have no bearing on the issue now before this court, and the entire section is, of course, limited by the prohibition contained in the Seventh Amendment.

While at the time of the adoption of the Federal Consti- [fol. 46] tution, when the ground for a new trial was excessive damages, there were authorities in the early English common law courts holding that a new trial might be granted on the ground of excessive damages, Blackstone's Com., Vol. 3, p. 388-392; but the practice of denying a motion for a new trial on this ground, if a remittitur was filed by the plaintiff, does not seem to have become firmly established in England except by consent of both parties; Leeson v. Smith, 4 Neville & Manning's Rep. 304, 306; Watt v. Watt, Appeal Cases, 1905, p. 115; also see 2 Am. & Eng. Ann. Cases, 672 (a decision by the House of Lords).

In any event, we have been referred to no English case, nor has one been found after a somewhat extensive research, in which it has been held that, in case of inadequate damages, a new trial may be denied, provided the defendant consents to have judgment entered for a larger amount —fixed by the court—than the verdict of the jury. Ducker v. Wood, 1 T. R. 277; Hewlett v. Cruchley, 5 Taunt. 277; Duberley v. Gunning, 4 T. R. 651; Chambers v. Caulfield, 6 East. 244; Harry v. Watson, cited 4 T. R. 659, 660; Fabrigas v. Mostyn, 2 Sir W. Blackstone's Reports 929; Cuming v. Sibly, 4 Burr. 2489; Phillips v. South Western Railway Co., 4 Q. B. D. 406.

The case of Belt v. Lawes, 12 Q. B. D. 356, in which it was held that a motion for a new trial might be denied, if a remittitur was filed, was later considered and overruled in Watt v. Watt, supra (which also involved a reduction of excessive damages), in which case the Earl of Halsbury said at page 119: "My Lords, I am unable after a very anxious examination of the earlier authorities to assent to the legality of this proceeding unless by the assent of both parties. * * * Hesitating, as I do, to differ from the opinion expressed by my noble and learned friend Lord Lindley, I have come to the conclusion that there is no

power in the court to alter the verdict except by ordering a new trial. * * *"

The case of Watt v. Watt was cited in Lionel Barber & Co. v. Deuche Bank, Appeal Cases (1919) 304, 314-5, as establishing the rule that, according to the English common law, the defendant is entitled to insist that the case be re-heard by another jury, and that excessive damages can- [fol. 47] not be reduced except by consent of both parties. Reference to a prior practice where the issue was not raised cannot, of course, control carefully considered opinions by the House of Lords.

However, the practice of denying a motion for a new trial, in case of a remittitur being filed, was early recognized in the federal courts, following, no doubt, the practice in some of the lower English common law courts, as it was understood at the time of the adoption of the Constitution; Blunt v. Little, 3 Mason, 102; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69; Kennon v. Gilmer, 131 U. S. 22, 29; and while in case of a clear omission of some definite item of damage, certain state courts, to avoid the expense of a new trial, have ordered judgment for an amount that will include the omitted item, as in Carr v. Miner, supra; James v. Morey, 44 Ill. 352; and Clark v. Henshaw Motor Co., supra, it has never been held by any federal court that a motion by a plaintiff for a new trial on the ground of inadequate damages, where the damages were unliquidated, could be properly refused, provided the defendant consented to have judgment against him for a larger sum—determined by the court—than that awarded by the jury.

Granted that the Seventh Amendment does not require that old forms of practice and procedure be retained to preserve the right of trial by jury according to the rules of the common law, Walker v. New Mexico & Southern Pac. R. R. Co., 165 U. S. 593, 596; that it does not prohibit the introduction of new methods for determining what facts are actually in issue; that it does not prohibit the introduction of new rules of evidence, or that new devices may not be used to adapt the ancient institution to present needs to make of it an efficient instrument in the administration of justice; and that such changes are essential to the preservation of the right; the limitation imposed by the Amendment does require that enjoyment of the trial by jury shall not

be obstructed, and that the ultimate determination of issues of fact by the jury shall not be interfered with. Ex Parte Peterson, 253 U. S. 300, 309-310.

[fol. 48] The determination of damages may be submitted to arbitration, but only by consent of both parties; and in case of default the court may assess damages or refer the question to assessors; but where one of the parties has asked for a jury trial no fact found by a jury can be re-examined in a United States court except in accordance with the Seventh Amendment.

That issues of fact must be submitted for determination by a jury with such instruction and guidance by the court as will afford opportunity for that consideration by the jury which was secured to litigants by the rules governing trials at common law, is not a matter of form, but of right. Gasoline Products Co. v. Champlin, 283 U. S. 494, 498. Beyond changes in forms of practice and procedure from those followed in jury trials at common law, the federal courts have never approved any departure that in the final analysis in any way impaired a litigant's right to have a jury in a common law action weight the evidence and determine the facts.

Limitations upon the powers of the trial court under the Seventh Amendment over the verdict of a jury, have been defined by the Supreme Court in Slocum v. New York Life Ins. Co., 228 U. S. 364; Young, Adm'x, v. Central R. R. Co. of New Jersey, 232 U. S. 602; Capital Traction Co. v. Hof, supra; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642; Minneapolis, etc., Ry. v. Moquin, supra; Fairmount Glass Works v. Cub Fork Coal Co. et al., 287 U. S. 474, 485; also see United States v. Train, supra; Hughey v. Sullivan, 80 Fed. 72; Moran v. Washington Ry. & Elec. Co., 49 Fed. (2d) 679.

The statement in the opinion in Arkansas Valley Land & Cattle Co. v. Mann, supra, page 74, that the authority of a trial court to determine whether the damages are excessive, implies authority to determine when they are not of that character, obviously cannot be construed as definitely holding, or even implying, that in case of inadequate damages the trial court has the power to determine an amount that is not inadequate, if in excess of that awarded by a jury. The language in the Arkansas Valley Land & Cattle Co. case clearly refers only to the power of a trial court to [fol. 49] fix the maximum amount that is not excessive,

when a jury upon an examination of the facts has awarded a larger and excessive amount.

In the case of an excessive verdict, and the trial court refuses to grant a new trial on motion of the defendant, provided a remittitur is filed by the plaintiff, the denial of a defendant's motion is sustained on the ground that he is not prejudiced, because the judgment entered is for a less amount than a jury has already found against him; but when the damages awarded by a jury are clearly inadequate, and the plaintiff's motion for a new trial on that ground is denied, provided the defendant consents to have judgment entered against him for an increased amount fixed by the court, although the plaintiff recovers more than the award of the jury, he is thereby denied the right to have a jury pass on the amount of his actual damages. In the first case a jury has already awarded a sum in excess of that fixed by the court as a basis for a remittitur, which, at least, finds some support in the early English practice; while in the second case no jury has ever passed on the increased amount, and the practice has no precedent according to the rules of the common law.

In order to avoid the prohibition of the Seventh Amendment, the burden, we think, is on the party seeking to sustain an alteration of a jury's verdict by a federal judge to show that it is "according to the rules of the common law." Such a practice cannot be sustained merely because, in the case on trial, it may seem to the trial court to advance the cause of justice, end litigation and lessen the expense, if it impairs the right of trial by jury as established in the common law courts of England at the time of the adoption of the Constitution and the Seventh Amendment.

If the plaintiff in this case was entitled to recover, he was obviously entitled on the evidence to recover more than $500 for pain and suffering, loss of wages, and expenses of treatment in effecting a recovery; but, as there was some evidence tending to show that the plaintiff was guilty of contributory negligence, the inadequate verdict may well have been due to a compromise among the jury. If so, a new trial was clearly the only proper remedy.

The Supreme Court in Minneapolis, etc., Ry. Co. v. [fol. 50] Moquin, supra, held that if the excessive damages were due to passion, bias or prejudice, no remittitur can be filed, since, as the court said:

"In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The federal courts have no authority to order a judgment for one party when the jury has found a verdict for the other, or what was termed in the ancient practice a judgment non obstante veredicto. Young, Adm'x, v. Central R. R. Co. of New Jersey, supra.

For the trial court to limit the amount of damages a plaintiff can recover in addition to those found by the jury, even with the consent of the defendant, is as much a usurpation of the prerogatives of the jury and a violation of the Seventh Amendment as in the case of awarding a verdict non obstante veredicto, especially when the damages are unliquidated.

The Wisconsin courts appear to have adopted such a practice in case of inadequate damages; but, as has been pointed out, the practice in this respect in the states cannot control in the federal courts. Since we have been referred to no other cases, either state, federal or English, than those above referred to, in which such a practice is approved, and since such an exhaustive work on federal procedure as Hughes' Federal Practice makes no reference to such a practice in the federal courts, and as the granting of a new trial fully preserves the rights of both parties, it leads us to conclude that there is no necessity, or sound basis, for such a departure from the rules of the common law.

The judgment of the District Court is reversed with costs, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION, MORTON, J.—Filed April 20, 1934

MORTON, J. (dissenting):

I regret that I am unable to agree and, as the question is of some general importance, I will state my views.

The essential facts are simple. The plaintiff sued the defendant at law to recover damages for personal injuries, and obtained a verdict. He regarded the verdict as much too small, and moved to set it aside on the ground of inadequacy of damages. The trial judge made an order that, "If the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages." The defendant filed the stipulation called for, and judgment was duly entered thereon.

The plaintiff has appealed, and contends: (1) that the District Judge exceeded his authority in giving the defendant the election to avoid a new trial by stipulating an increase in damages; (2) that the order should stand as one granting a new trial.

It is argued that the order was invalid, both at common law, and under the Seventh Amendment to the Constitution. The Seventh Amendment reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

It occasionally happens that in assessing damages a jury returns an amount beyond any figures which could be reached upon a fair and reasonable consideration of the case. In that event it becomes, under our practise, the duty of the trial judge to set the verdict aside, unless the plaintiff elects to reduce it by a remittitur to a just figure stated by the judge. The use of remittiturs implies power in the trial judge to determine the upper limit of reasonable

damages—as was clearly pointed out in Arkansas Valley Company v. Mann, 130 U. S. 69, s. c. 51 L. R. A. n. s. 863. [fol. 52] There is a lower limit to reasonable damages as well as an upper one; and this is equally for the trial judge to determine. On the lower side, the question is somewhat complicated by the possibility that certain jurors might have yielded doubts as to liability in view of a small award on damages, who would not have yielded their doubts if the damages had been larger. See Fairmount Glass Wks. v. Cut Fork Coal Co., 287 U. S. 474, 475. We need not concern ourselves, however, with this aspect of the matter because the defendant has accepted the verdict on liability and has stipulated that the damages might be increased. We are dealing only with objections by the plaintiff to the order which was made.

In the remittitur cases, the intention of the jury is assumed to be to give the highest damages legally permissible. The trial judge, in effect, names that figure, and gives the plaintiff an election to accept it. I cannot see why the same principle does not apply when the damages found by the jury are below the minimum reasonable amount, nor why the trial judge may not state the minimum reasonable figure—as he admittedly may state the maximum one—and give the defendant the election of paying it or submitting to a new trial. In each instance the verdict is accepted as to liability and the intention of the jury as to damages is given effect as far as legally permissible. In neither instance is the amount of the damages determined by the jury. But this does not prevent remittiturs and, as I have said, I can see no distinction affecting the powers of the trial judge, between them and the order made in this case—which might perhaps be termed an "additur". In the majority opinion remittiturs are distinguished on the ground that the defendant "is not prejudiced, because the judgment entered is for a less amount than a jury has already found against him." But it is not explained in what way the appealing plaintiff is prejudiced who receives more damages than a jury has found for him. I cannot see this distinction—on which in the last analysis the majority decision rests—nor do any of the English judges appear to have recognized it. On the contrary the Court of Appeals explicitly refer to reducing a verdict or increasing it [fol. 53] by action of the trial judge, as resting on the same

legal foundation. Both had been done in England until both were outlawed by the Watt (1905 A. C. 115) case which, although quoted from in the majority opinion, is clearly not the law of the Federal Courts. Arkansas Valley Co. v. Mann, supra, and cases cited below.

In Belt v. Lawes, 12 Q. B. D. 356, in the Court of Appeal Lord Esher says, "the Court has power to refuse a new trial without the consent of the defendant, on the plaintiff's consenting to the amount of the damages being reduced to such an amount as, if it had been given by the jury, the Court would not have considered excessive. * * *"

He then adds, "Suppose a case in which a new trial should be moved for on behalf of the plaintiff, on the ground that the amount of damages which the jury had given was obviously unreasonably too small"—exactly the present case—"I am far from saying that the Court would not have power in favour of the defendant, and in his interest, to say that the damages given are too small, but that if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused." The other justices Baggalley and Lindley concurred in these views. With respect to the practice thus approved, Lord Davey says in Watt v. Watt, "I do not doubt that such orders (remittiturs) have been frequently made, but they have not been challenged, and in the vast majority of cases the defendant is well advised to submit to a verdict for the reduced amount rather than incur the risk and expense of a new trial. Nor do I doubt that the power (if it exists) would be convenient, and in the most cases do substantial justice and save expense." In Fleming v. Bank of New Zealand, 1900 A. C. 577, the jury returned a verdict for the plaintiff for two thousand pounds. The Judicial Committee of the Privy Council decided "that a new trial ought to be directed unless the plaintiff consented that the damages shall be reduced to five hundred pounds," etc.; that is, they used a remittitur in their final judgment. Watt v. Watt in outlawing remittiturs was at variance not only with Belt v. Lawes, and with the commonly accepted practice of [fol. 54] many years, but also with the considered judgment of the Privy Council in the then recent Fleming case, supra. It also ran counter, as Lord Davey frankly admitted, to practical convenience in doing substantial justice and sav-

ing expense. However, as Watt v. Watt does not represent the law in the Federal Courts it is unnecessary to extend the discussion.

As the propriety of remittiturs in the Federal Courts is established (Tevis v. Ryan, 233 U. S. 273, where judgment entered on a remittitur was affirmed; Denny v. Pironi, 141 U. S. 121, 126; Arkansas Valley v. Mann, supra; Copley v. Ball, 176 Fed. 682, 692 (C. C. A.) plaintiff allowed remit as to land in ejectment suit), it seems to me to follow the order appealed from was not beyond the discretionary power of the trial judge. Clark v. Henshaw Co., 246 Mass. 386; Adamson v. County of Los Angeles, 198 Pac. Rep. 52. The way in which he dealt with the matter was direct and accomplished practical justice. These are weighty considerations on a question of practice, and ought not to be disregarded except for compelling reasons. I do not think that the Constitution prohibits improvements in the machinery for administering justice or restricts our procedural methods to those in use in the days of hand-looms and sailing ships. That view was strongly—and I believe rightly—repudiated in the Arkansas Valley Co. case, supra, and Walker v. Southern Pacific Railroad, 165 U. S. 593, 596. Cases like Shanahan v. Boston and Northern Street Railway, 193 Mass. 412, in which the finding of the jury on liability was disregarded by the trial judge in an effort to impose his views on the parties have no bearing on the present question. Here the trial judge accepted the jury's verdict as to liability. The part of his order which is objected to relates only to damages. The law recognizes a distinction between questions of liability and amount of damages, e. g. agreements for arbitrating the former were at one time regarded as against public policy, but agreements for the arbitration of damages were held valid. In the 17th and 18th centuries judges appear to have exercised great freedom in dealing with damages found by a jury. See Buller's Nisi Prius, 7th edition (1817) p. 21 (a). On the historical aspects of the question the cases, stated [fol. 55] in this book and in the earlier edition of it dated 1772, wherein damages in tort found by a jury were increased by judicial order, are interesting. They tend to support the views of the Court of Appeals and the Privy Council—and of the United States Supreme Court—as to the discretionary powers of the court over damages at com-

mon law. See Watt v. Watt, 1905 A. C. 115, at 119. In my opinion the judgment appealed from ought to be affirmed.

[fols. 56 & 57] In United States Circuit Court of Appeals

Argument and Submission

On January 17, 1934, this cause came on to be heard, and was fully heard by the court, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

In United States Circuit Court of Appeals

Judgment—April 20, 1934

This cause came on to be heard January 17, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, April 20, 1934, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and with costs, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court,

Arthur I. Charron, Clerk.

Recital as to Stay of Mandate

Thereafter, to wit, on May 14, 1934, mandate was stayed until further order of court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,706. U. S. Circuit Court of Appeals, First Circuit. Term No. 78. David G. Dimick, Petitioner, vs. Peter Schiedt. Petition for a writ of certiorari and exhibit thereto. Filed May 31, 1934. File No. 78, O. T., 1934.